B. Summary of Prosecution Evidence Directly Relating to the Claims Submitted in Respect of the Fire at 132 East Flagler Street Alleged in the Indictment.

There was evidence from which the jury could find that Cohen purchased the business at 132 East Flagler Street, conducted under the name of Flagler Imports, from petitioner Leon Adjmi, hereafter "Leon" (R. 511-512, 664-665, 688), with money lent by the petitioner Joseph Adjmi, hereafter "Joseph" (R. 512-513), and that all the Adjmis assigned their lease to him (R. 518-519).

After Cohen's original insurance was cancelled (R. 334-355), new insurance was written for him at Joseph's suggestion to an agent, and that coverage was increased after Joseph told the agent that Cohen needed more because Joseph had lent him merchandise (R. 365-374, 390-397). New merchandise, consisting of linens and Dresden china, was moved into Cohen's shop (R. 615-616), and he had $210,000 of insurance in force when the fire took place two days later, on September 25, 1958 (R. 376-377, 384-385).

The fire was confined to the mezzanine, producing some but not heavy smoke, and no soot or fallout (R. 128-254). Firemen said that only a few linens were burned (R. 159-160, 222), but that none of the porcelain figurines were broken (R. 132-133, 160-162, 224, 246-249, 259, 264, 283, 294, 298, 310-314).

Later, several of the figurines were seen to be broken (R. 133, 155, 203, 206, 298-299, 313, 358), and a heavy charcoal deposit was observed (R. 204-205, 312, 358-359), which as a matter of laboratory analysis differed from smoke fallout (R. 400-404, 409, 418-430, 434, 440-450). Following the fire, the figurines and linens that Cohen had received from Joseph were returned to the latter (R. 529-532, 594, 749).

Cohen submitted and mailed two proofs of loss, aggregating $208,000 (Govt. Ex. 24, 27; R. 453-460, 475-482, 523, 531). In consequence of conferences with numerous

insurance adjusters, Cohen's claim was scaled down to $96,000 (R. 384-388, 468-470), but it was ultimately denied *in toto* (R. 470, 472, 488-503).

C. Colloquy Over Admissibility of Evidence Concerning Other Fires to Show Intent of the Adjmis; Other Indictments of the Adjmis Involving Those Other Fires.

Following the introduction of the prosecution evidence that has just been summarized, the United States Attorney in a colloquy outside the presence of the jury undertook to offer, as bearing on the intent of the Adjmis under the asserted doctrine of *Weiss v. United States,* 122 F. 2d 675 (C. A. 5), certiorari denied, 314 U. S. 687, evidence showing their complicity in three other fires in respect of which they had allegedly also submitted false claims (R. 762-766).

These involved, first, a fire on March 21, 1958, on the premises of the J. & C. A. Corporation d/b/a Dresden Galleries; second, a fire on September 29, 1958, on the premises of Dauber, Inc.; and, third, a fire on October 8, 1958, on the premises of the French Shop, Inc., owned by one Sam Mishon (R. 763-766).

Petitioners' counsel advanced the following objection, based on prior proceedings:

First, there had earlier been returned another indictment (No. 11971; Ct. Ex. 1) which had included counts and allegation in respect of all four fires, that at Flagler Imports as to which proof had already been adduced, as well as concerning the three others that the prosecution now proposed to offer on the issue of intent; and this earlier indictment had been dismissed because the inclusion of four fires in a single indictment had been deemed prejudicial (R. 766-773).

Second, there had subsequently been returned four indictments, each dealing with the alleged frauds arising

out of each of the four fires—the one presently on trial, No. 63-115, in respect of the Flagler Imports fire, and three others, Nos. 63-116, 63-117, and Orlando Division No. 1276, concerning the three other fires that the prosecution had sought to introduce into the present case (R. 767-771, 808-812).

Finally, third, the prosecution's motions to consolidate for trial the four separate indictments each restricted to a single fire had been denied prior to the present trial because of potential prejudice to the defendants (R. 26, 767-771, 778-785, 790-792, 807-808; Ct. Ex. 2).

In the light of these prior proceedings, petitioners objected at length to the admission of any testimony whatever involving the other fires (R. 766-773, 795-797, 799-801).

Arguing in reply, the United States Attorney limited his argument on admissibility to intent, state of mind, limited purpose, and "limiting instruction" (R. 774-778, 785-787, 798-802).

At the close of the long colloquy just set forth, petitioners moved for a severance (R. 802-803).

The trial court ruled that, under the Weiss doctrine, evidence of intent was admissible (R. 805-806), and denied the motion for severance (R. 806). Repeating that the proffered evidence was admissible on the issue of intent (R. 809), the trial judge quoted a former judicial colleague as saying (R. 810) "that if the defendant didn't want the evidence of other crimes to go to the jury, he should commit only one crime at a time."

At the close of the colloquy, the court gave all defendants a standing objection to all testimony relative to all fires other than the one that occurred at 132 East Flagler Street, the one alleged in the present indictment (R. 815-817).

D. Evidence Regarding Other Fires in Which the Adjmis Were Involved.

Following the ruling just mentioned, the prosecution introduced evidence concerning three other fires in which the Adjmis but not the appellant Cohen were involved.

(i) First was a fire on the premises owned by the J. & C. A. Corporation, which was there doing business under the name of Dresden Galleries, on January 23, 1958; a passerby had flipped a cigarette into an awning, this caught fire, and in the course of extinguishing the fire the awning collapsed, breaking the plate glass window and causing damage, for which proofs of loss were submitted (R. 953-961; Govt. Ex. 77-79). In respect of this fire, the prosecution contended, on the basis of testimony from the supplier of the damaged merchandise (R. 975 *et seq.*) that the claim was too high by $2,000 (R. 1335-1336).

(ii) Next was an accidental (R. 923) fire on the same premises on March 21, 1958. There was evidence from which the jury could find that, at Joseph's request, new insurance supplanting other policies was written in January 1958 (R 820-831); that thereafter an inventory was made and a claim submitted (R. 839-882, 923-924). In the course of the adjustment process, there were questions concerning the inventory (R. 916-921).

Celnick, a New York importer of china and porcelain who sold such articles to the Adjmis, testified that his sales prices were in many instances substantially less than the prices placed on the supporting invoices that the corporation had submitted (R. 966-1023). Karpus, another New York importer, testified to the same effect, and also said that, at Leon's request, he had supplied a false invoice that was requested in connection with a fire claim (R. 1034-1065).

(iii) The third fire took place in a back room at French Shop, Inc., in Miami, owned by one Sam Mishon, on October 8, 1958, when an electric flatiron was left plugged in (R.1111-1115). There was testimony from which the jury could find that this was a store that sold ladies apparel and sportswear (R. 1108, 1123-1125, 1150); that at Joseph's request on September 30, 1958, additional insurance was effected for Sam Mishon because he was getting additional merchandise; that the increased insurance came to $145,000; and that Joseph said he would stand back of the $500 premium check that Mishon was reluctant to write because of lack of funds (R. 1148-1156). Joseph said he sold $125,000 worth of linens to Mishon, but produced no supporting documents (R. 1079-1083, 1099-1105). The sale was not reflected on the books of J. & C. A. Corporation, and Joseph and the corporation's accountant later admitted to a revenue agent that this was a fictitious contract so far as the Adjmis were concerned and was a fake for some insurance purposes (R. 1084-1087, 1089-1092).

Linens and embroidery listed by the insured were, according to appraisers of both, overvalued (R. 1162-1265).

Evidence was received from postal officials as to the mailing of certain proofs of loss submitted in connection with fires other than the one on 132 East Flagler Street alleged in the indictment (R. 1136-1138, 1139-1144).

In the course of the foregoing testimony regarding the other fires, counsel for the petitioners, notwithstanding the standing objection they had been given, regularly moved to strike the evidence of every witness that was unrelated to the Flagler Imports—132 East Flagler Street fire alleged in the present indictment, and objected on that basis to all similarly unrelated exhibits (R. 826-827, 833-834, 835, 857-859, 866, 873-874, 875-876, 882, 885-886, 890, 892, 895-896, 899-900, 901-902, 912, 914, 921, 928-929, 940-941, 945, 950, 951, 952-953, 957-959, 973-974, 1014, 1048, 1069-1070, 1072-

1073, 1076, 1077, 1083-1084, 1088, 1092-1093, 1097-1098, 1105, 1110, 1115, 1122, 1125-1126, 1131, 1133-1134, 1135-1136, 1138-1139, 1144-1145, 1158-1159, 1174-1177, 1228-1229, 1232, 1251-1252, 1254, 1255, 1265).

E. The United States Attorney Transforms the Prosecution Into One for a Master Plan for One Continuous Scheme of Conspiracy Involving Four Fires.

Inasmuch as none of the witnesses called in connection with the three other fires knew or had any dealings with Cohen, or knew anything about his business or his premises at 132 East Flagler Street (R. 828, 830, 868, 952, 959-960, 1061, 1099), Cohen moved that the testimony regarding the other fires, which were quite unrelated to him, be stricken (R. 1268-1270).

Arguing in opposition to the Cohen motion, the United States Attorney completely transformed the prosecution from the single conspiracy involving the East Flagler Street fire alleged in Count 3 of the indictment (R. 5-7). He said (R. 1270):

> "We have before the Court now a rather simple master plan, so to speak, which, from the evidence adduced was one continued scheme of conspiracy with various and sundry people coming and going into it, like Mishon coming into the picture and Cohen coming into the picture after the inception of this scheme."

The United States Attorney then proceeded to recite the series of four fires, first that in January 1958 at Dresden Galleries, then the larger one there in March, next the Flagler Imports fire, and finally the one in the French Shop (R. 1270-1272), after which he said (R. 1272, 1273):

> "So we can clearly see that we don't have just multiple claims, multiple frauds, multiple conspiracies.

The testimony and the facts before the Court and the jury right now is, and the reason it is all admissible against all the parties is that this is all one scheme. * * *

"* * * we have one plan, starting in January, going to March, to September and October losses. * * * We have more than the Weiss case of just similar transaction to prove intent. We have one scheme, consisting of four fires. * * *"

Again recapitulating (R. 1273), the prosecutor concluded (R. 1273-1274):

"So we have four fires as a part of one scheme.

"And that is why the evidence is admissible as it stands right now against all of the parties. * * * On the question, not only of conspiracy, but on the question of a scheme to defraud. The indictment charges that the scheme * * * had its inception prior to September of 1958 and continued to the return of the indictment. So it is broad enough to encompass all of the fires as one master plan."

Further (R. 1274-1275),

"The way the evidence has come in, it is just one conspiracy. It is not separate transactions relating to intent. It is one scheme and one conspiracy with parties coming and going, Cohen coming and going, Mishon coming and going * * * it is all too clear that this is one picture with various and sundry people who have come and gone."

And once more (R. 1275):

"* * * a motion to strike the testimony as to Cohen * * * is not a proper motion under the facts and the law of the case because we have one scheme and the jury should consider whether or not the scheme existed and who were the participants. * * *"

After a further colloquy, the United States Attorney said (R. 1283):

> "We have shown one transaction, one scheme. I submit it is proper to go before the jury on either theory, either they find that the similar transactions occurred, and I submit that as it now is before the Court and jury it is one scheme—if they were to find they were just similar and not one scheme, they could consider it as to the intent of the parties. But they could find that one scheme or one conspiracy existed, and, accordingly consider that in rendering their opinion."

Before the trial judge ruled, counsel for these petitioners then moved to strike the evidence of the other fires (R. 1285-1288), arguing *inter alia* that the prosecution should be bound by its four separate indictments.

Motions for acquittal were denied (R. 1297-1298), after which all defendants rested (R. 1299-1300), and the several motions to strike were overruled (R. 1308, 1311).

In his argument to the jury, the United States Attorney made the following references to the single scheme he had put forward in his arguments in opposition to Cohen's motion to strike:

> "* * * we felt at the outset that we had what you might call a master plan, an over-all scheme, and accordingly from that which is heretofore gone on—meaning we have a fire sometime in September in the indictment, but we have proved to you a fire in January, a fire in March, a fire in October, and we ask you * * * to consider all of those in determining whether or not a scheme and/or conspiracy existed." (R. 1334)

> "We are going back to January of 1958. That was the start of this scheme, the start of this conspiracy." (R. 1335)

After relating the January fire, "This is the start of this whole scheme" (R. 1336). "So we have the inception of this scheme, the inception of the conspiracy in January" (R. 1337).

After dealing with the March fire, "So here we have another step, another step leading up to fire, that we charge is the fire which is the subject matter of this indictment" (R. 1341).

Further (R. 1344),

> "I am sure counsel for the defendants are going to say that isn't what they are charged with. They are charged with the Cohen fire. But isn't this clearly, unquestionably a fraud in the January fire, in the March fire, when you have the same type of fraud committed by the exact same parties?
>
> "Now let's get to the Cohen fire, the subject matter of the indictment. * * *"

F. Charge; Verdict and Sentences; Appeal.

(i) With reference to the evidence of the other fires, the trial judge charged as follows:

> "* * * there are two questions only for your determination at this time. One is the sole question as to whether there was a fraud or a scheme or an artifice and whether the mails were used * * *." (R. 1423)
>
> "I permitted testimony about other fires and other things for the purpose of enabling the jury to determine whether or not there was an intention on the part of the defendants to form a scheme to defraud." (R. 1424)
>
> "So if you find there was a scheme, then everybody who was a part of that scheme, whatever one did, every [even?] though the others were in distant place, yet each one would be responsible for what the one who did some act does." (R. 1425)

"So that the question I see for your debate and your consideration is the question as to whether there was an intention to form a scheme, and, incidentally whether it was formed and who were the members of the scheme." (R. 1425)

"The question for you is whether or not a scheme was devised and intended to be devised. And for that purpose all of this testimony about other fires was admitted so that you might be able to determine whether or not there was an intention on their part to devise a scheme, and whether or not a scheme was devised, and who the members of this scheme were. So all this testimony must be considered by you in reaching a conclusion as to who were participants in the scheme." (R. 1430-1431)

Objection was made on behalf of petitioners that the evidence of the other fires was not limited to intent (R. 1450-1451, 1455-1458).

The judge then charged further regarding the law of conspiracy, speaking always of "a conspiracy" and "the conspiracy" (R. 1462-1466). The defendants renewed their objections (R. 1469-1470).

(ii) With respect to the indictment, the trial judge originally charged as follows (R. 1423):

"As I said, the indictment was returned by a Grand Jury, but the Grand Jury heard evidence on only one side of the case. The view of the Grand Jury was that if the same evidence which was before the Grand Jury was repeated at the trial, unless it is repudiated in some way or overcome in some way, the defendant ought to be convicted. So it is upon that theory that the Grand Jury returned an indictment."

Once the trial judge had concluded his charge, the United States attorney immediately objected to the foregoing passage as incorrect (R. 1441-1442). The defendants

moved for a mistrial on the ground that this erroneous impression could not be eradicated (R. 1453-1454); that motion was denied (R. 1458).

Thereafter, the trial judge charged as follows (R. 1461):

> "* * * I said something about what the Grand Jury did in this case. I think it is proper for me to withdraw that statement. I said the Grand Jury, while they heard only one set of circumstances, from what they heard they decided that if that evidence was not refuted, the defendants ought to be convicted. I withdraw that, because the rule is the defendants, if they testify at all, they don't have to rebut anything. It is for the jury to determine from all the evidence whether they are guilty or innocent."

After the trial judge concluded his lengthy supplemental charge, the defendants renewed their original objections, and renewed as well their motion for mistrial, which was again denied (R. 1469-1470).

All of the defendants named in the indictment were found guilty as charged (R. 1472-1473).

Each of the Adjmis was sentenced to a total of 10 years' confinement (5 years on each count, two counts to run consecutively, two counts concurrently) and a fine of $1,000 (R. 1496-1498).

On appeal, the judgment was reversed as to Charles Adjmi because of insufficiency of evidence, but affirmed as to the other individuals. The court concluded that "the charge when construed as a whole did not imply that there was any obligation upon the defendants to take the witness stand, did not misplace the burden of proof, and presents no prejudicial error," and further rejected without discussion all contentions made in respect of the broadening at the trial of the conspiracy charged in the indictment.

REASONS FOR GRANTING THE WRIT.

It would be difficult as an original proposition, petitioners submit, even to imagine an instance of cumulative prejudice such as is reflected in this record, both aspects of which involve the palpable disregard both by the district court and the court of appeals of principles long since considered settled by decisions of this Court. On one side, these petitioners have been tried for and convicted of a conspiracy far wider in scope than that alleged against them in the indictment, an error compounded by the circumstance that the prosecution's earlier attempts to bring before a single jury their participation in precisely that wider conspiracy had twice been halted by the district court. On the other side, this improperly enlarged accusation was heard by a jury that had been all too plainly told that petitioners were under no obligation to rebut what the grand jury alleged if they testified—*but not otherwise,* and they did not take the stand.

First. The heart of this case is that petitioners, charged for participation in a conspiracy arising out of a single fire, have in fact been tried for participation in a conspiracy encompassing a master scheme involving four fires, and this after two previous attempts by the prosecution to have a single jury hear about all these four fires were rejected by the court.

At the outset a single indictment indeed alleged petitioners' participation in all four fires; that indictment was deemed too prejudicial by the court, and was dismissed for that reason. Next, after each of the four fires was made the subject matter of a separate superseding indictment, the prosecution sought to obtain the same atmospheric benefit (with, it goes without saying, the same prejudice to the defendants) by moving to consolidate the four new indictments into a single trial; that motion was denied. But at the present trial of the first superseding indictment, which alleged only a conspiracy arising out of the single

fire at East Flagler Street, the prosecution recurred to its fixation concerning "the master scheme" involving four fires, and was permitted to do so, not only by the trial judge but now with the sanction of the court of appeals.

This is not a case where, under familiar principles (2 Wigmore, *Evidence* [3d ed. 1940] §§ 300, 302, 321, 340-341), evidence of similar acts is admissible in prosecutions involving allegations of fraud to show intent, i.e., to establish that defendants' acts were not done innocently or inadvertently, but were performed with an intent to deceive and defraud. Here the trial judge submitted such evidence of similar acts to the jury for a much broader purpose, committing double error in the process.

First, he erred in charging that the evidence relating to the other fires was limited, not to showing intent to defraud, but to showing intent "to form a scheme to defraud," i.e., to join a conspiracy. But evidence of overt acts not named in an indictment to defraud is admissible to show, not whether a particular defendant joined the conspiracy, but only to show the intent with which he did so. *American Medical Ass'n v. United States,* 130 F. 2d 233, 250-251 (D. C. Cir.), affirmed on other grounds, 317 U. S. 519; *Egan v. United States,* 137 F. 2d 369, 381-382 (C. A. 8); *United States v. Campagna,* 146 F. 2d 524, 530 (C. A. 2), certiorari denied, 324 U. S. 867.

Second, the trial judge erred in never explaining to the jury just which conspiracy the several defendants might be forming, the conspiracy to file claims in respect of the East Flagler Street fire alleged in the indictment, or the master scheme to file claims in respect of four fires that the United States Attorney argued to the jury.

Thus, the charge as given permitted the evidence concerning the other fires to go in for a far broader purpose than that for which it was originally adduced and to which under the authorities it should have been limited, viz., to show intent to defraud. Moreover, by constantly speaking

of "a conspiracy" and "the conspiracy," of "a scheme" and "the scheme," the trial judge submitted to the jury, not the accusation of a limited scheme that was set forth in the indictment and that had been explained in the prosecution's opening argument, but the accusation of the comprehensive master scheme involving a series of four fires that the United States Attorney presented in his final summation.

In consequence, not only was there a plainly prejudicial variance, in the teeth of this Court's ruling in *Kotteakos v. United States,* 328 U. S. 750, but petitioners were accused of one offense and convicted of another, in palpable violation of *Cole v. Arkansas,* 333 U. S. 196, and of *Stirone v. United States,* 361 U. S. 212.

Second. Petitioners are in no sense indulging in afterthoughts when they assert prejudicial error in the trial judge's original charge, "The view of the Grand Jury was that if the same evidence which was before the Grand Jury was repeated at the trial, unless it is repudiated in some way or overcome in some way, the defendant ought to be convicted." Not only did they object to that plainly and indeed palpably erroneous formulation, to the extent of seeking a mistrial in consequence, but they were anticipated in their objection by the prosecution: the United States Attorney was the first lawyer on his feet to point out this obvious and fundamental mistake (R. 1441-1442).

But when the judge sought to remedy his lapse, he did not cure the error, he compounded it; his later comment was (R. 1461):

> "I said the Grand Jury, while they only heard only one set of circumstances, from what they heard they decided that if the evidence was not refuted, the defendants ought to be convicted. I withdraw that, because *the rule is, the defendants, if they testify at all, they don't have to rebut anything.* It is for the jury to determine from all the evidence whether they are guilty or innocent."

The italics have been added, because, quite apart from the impression inescapably conveyed by the trial judge's repetition of his original error, an impression plainly not helpful to the defendants, the obvious vice of the attempted correction lies in the interpolated clause, "if they testify at all."

The plain meaning, the only possible meaning of the qualification "if they testify at all," is that, if they do not testify, the statement that "they don't have to rebut anything" becomes inapplicable. The obvious implication of the italicized words is that defendants who do not testify must still rebut what the grand jury has alleged—and here neither the petitioners nor their codefendants took the stand (R. 1299-1300).

In the event, therefore, the trial judge's charge violated at least three fundamental and hitherto unquestioned rules governing the conduct of a criminal trial—one, the rule that the burden of proof is on the prosecution in respect of every element of the offense (*Deutch v. United States,* 367 U. S. 456; *Davis v. United States,* 160 U. S. 469; *Coffin v. United States,* 156 U. S. 432); two, the rule that a defendant is entitled as of right to an instruction that no adverse inference may be drawn from his failure to testify (*Bruno v. United States,* 308 U. S. 287; cf. *Griffin v. California,* No. 202, decided April 28, 1965), so that even minimal comment on his not having testified has been held reversible error (*Stewart v. United States,* 366 U. S. 1); and three, the rule that an indictment is not evidence (e.g., *Poretto v. United States,* 196 F. 2d 392, 392, 395 (C. A. 5)).

And that combination of errors has now been sustained by the court below, "without placing a stamp of approval on the challenged portion of the charge" (*infra,* p. 23), under an application of the charge-as-a-whole doctrine that the same court on two recent occasions had rejected. In *Perez v. United States,* 297 F. 2d 12, 16, the court below said "It is * * * fundamental to our jurisprudence that instructions must be consistent with each other, and not

misleading to the jurors. * * * The fact that one instruction is correct does not cure the error in giving another that is inconsistent with it." This is so, said the court below in *Price v. United States*, 200 F. 2d 652, 655, because "We cannot speculate as to which part would be accepted by the jury * * *."

In the present case, however, those considerations were brushed aside, in order to sustain an instruction that the court below was plainly unwilling to approve.

Third. Petitioners here do not rest their application for review on the circumstance that the rulings of the court below were "wrong." They are asking that certiorari issue to the end that this Court's considered rulings in respect of not trying an accused on one allegation and then convicting him of another be given effect, to the end also that there be no further suggestions in jury charges that a defendant must somehow come forward to deny and rebut what is alleged against him as the price of avoiding conviction and imprisonment.

CONCLUSION.

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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Attorney for the Petitioners.

June 1965.

APPENDIX A.

OPINION BELOW AND JUDGMENT.

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT.

No. 21186

LEON ADJMI, ERWIN COHEN, JOSEPH ADJMI AND CHARLES ADJMI,

Appellants,

v.

UNITED STATES OF AMERICA,

Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF FLORIDA.

(March 31, 1965.)

Before TUTTLE, *Chief Judge,* GROOMS and MCRAE, *District Judges.*

PER CURIAM: Appellants were convicted for violations of the mail fraud statute, Title 18, U. S. C., Section 1341, and for conspiracy to violate said statute, Title 18, U. S. C., Section 371.

Five specifications of error are advanced, including the insufficiency of the evidence as to Charles and Leon Adjmi, and alleged error in the court's oral charge.

A review of the record discloses sufficient evidence to warrant submission of the case as to Leon Adjmi. The record, however, fails to reveal sufficient evidence to warrant submission as to Charles Adjmi.

In the course of the oral charge the court instructed the jury as follows:

"I am charging you and instructing you that the indictment of the case is no evidence whatsoever of the guilt of the accused. It is a mere formal charge. While it will be in your hands for memorandum purposes while you deliberate, you are not to consider it as evidence at all. As I said, the indictment was returned by a Grand Jury, but the Grand Jury heard evidence on only one side of the case. The view of the Grand Jury was that if the same evidence which was before the Grand Jury was repeated at the trial, unless it is repudiated in some way or overcome in some way, the defendant ought to be convicted. So it is upon that theory that the Grand Jury returned an indictment."

In the further course of the charge the court stated:

"[T]he defendants did not take the witness stand. The law protects them on that question. They don't have to take the witness stand and the jury should draw no adverse inferences from the fact that they did not take the stand. That is their right and their counsel has a right so to advise them, and the jury should not be influenced in any way by the fact that they did not testify. The responsibility is upon the Government to prove the averments of the indictment to your satisfaction beyond a reasonable doubt, as I have defined reasonable doubt, and heretofore instructed you."[1]

After counsel for the prosecution directed the court's attention to that part of its charge first quoted, the court withdrew same, saying:

"I think it is proper for me to withdraw that statement. I said the Grand Jury, while they only heard

1. See *Gradsky, et al. v. United States,* decided March 11, 1965, involving like instructions given by the same judge, where this Court stated that if there had been any implication from that part of the charge first quoted that there was an obligation on the defendants to take the witness stand it was completely answered by this further instruction.

only one set of circumstances, from what they heard they decided that if that evidence was not refuted, the defendants ought to be convicted, I withdraw that, because the rule is the defendants, *if they testify at all,* they don't have to rebut anything. It is for the jury to determine from all the evidence whether they are guilty or innocent." (Emphasis supplied)

Appellants contend that the alleged error was compounded in the attempt to withdraw the initial statement. We do not concur in this contention, especially in view of the court's further instruction:

"A reasonable doubt may arise, not only from the evidence produced but also from a lack of evidence. Since the burden is upon the prosecution to prove the accused guilty beyond a reasonable doubt of every essential element of the crime charged, a defendant has the right to rely upon failure of the prosecution to establish such proof. A defendant may also rely upon evidence brought out on cross examination of witnesses for the prosecution. *The law does not impose upon a defendant the duty of producing any evidence.*" (Emphasis supplied)

Without placing a stamp of approval on the challenged portion of the charge, we conclude that the charge when construed as a whole did not imply that there was any obligation upon the defendants to take the witness stand, did not misplace the burden of proof, and presents no prejudicial error.

We find no error in the other specifications.

The judgments are affirmed as to all defendants, except Charles Adjmi, and are reversed as to Charles Adjmi. The trial court is directed to vacate its judgment of guilty as to Charles Adjmi and to acquit said defendant.

AFFIRMED in part and REVERSED in part, and REMANDED to the District Court for proceedings consistent herewith.

JUDGMENT.

Before TUTTLE, *Chief Judge,* GROOMS and MCRAE, *District Judges.*

This cause came on to be heard on the transcript of the record from the United States District Court for the Middle District of Florida, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgments of the said District Court in this cause be, and the same are hereby, affirmed in part and reversed in part, in accordance with the opinion of this Court; and that this cause be, and the same is hereby remanded to the said District Court for further proceedings consistent therewith.

March 31, 1965

Issued as Mandate: May 21, 1965

APPENDIX B.

ORDER ON PETITION FOR REHEARING.

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 21,186

LEON ADJMI, ERWIN COHEN, JOSEPH ADJMI AND CHARLES ADJMI,
Appellants

v.

UNITED STATES OF AMERICA,
Appellee

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF FLORIDA

(May 13th, 1965)

ON PETITION FOR REHEARING

Before TUTTLE, *Chief Judge,* GROOMS and MCRAE, *District Judges.*

PER CURIAM:

It is ORDERED that the petition for rehearing or in the alternative for an order to stay the Court's mandate pending the timely filing and determination of an application for a writ of certiorari filed by Leon Adjmi and Joseph Adjmi in the above styled and numbered cause be, and the same is, hereby DENIED.